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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

LATONYA MOORE,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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19 pp

QUESTIONS PRESENTED

1. WHETHER THE DISTRICT COURT HAS THE AUTHORITY TO MODIFY A SENTENCE PURSUANT TO 28 U.S.C. § 2255 WHEN, THROUGH NO FAULT OF DEFENDANT, THE GOVERNMENT FAILS TO TIMELY ORDER THE DEFENDANT TO SURRENDER AND START SERVING HER EIGHT-MONTH SENTENCE UNTIL THREE YEARS AND TWO MONTHS AFTER THE MANDATE WAS ISSUED, ALL THE WHILE SUBJECTING DEFENDANT TO EXTREMELY STRICT CONDITIONS OF RELEASE.

2. WHETHER THE DISTRICT COURT HAS THE AUTHORITY TO MODIFY A SENTENCE PURSUANT TO 28 U.S.C. § 2255 WHERE THE COURT BELIEVES AN INJURY TO DEFENDANT'S CONSTITUTIONAL RIGHTS HAS OCCURRED WHICH WOULD NOT HAVE BEEN RAISED ON DIRECT APPEAL AND RESULTS IN A MISCARRIAGE OF JUSTICE.

3. WHETHER THE PANEL OPINION VACATING THE DISTRICT COURT'S ORDER IS IN CONFLICT WITH THE FIFTH CIRCUIT'S PREVIOUS DECISION IN *Shields v. Beto*, 370 F.2d 1003 (5th Cir. 1967).

LIST OF ALL PARTIES

1. LaTonya Moore

2. Chris Flood

3. United States of America

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JURISDICTION

The Order of the Court below denying Petitioner's Suggestion for Rehearing En Banc was entered November 5, 1997. This petition was filed within ninety (90) days of that date. The jurisdiction of this Court to review the judgment on petition for certiorari rests upon 28 U.S.C. § 1254(1) and Supreme Court Rule 10.

STATEMENT OF THE CASE

After a jury trial, Petitioner was convicted of violating 49 U.S.C. § 1472(j) (interfering with a flight attendant). Petitioner was sentenced to eight months' confinement and ordered to pay restitution in the amount of $1,871.35 to Continental Airlines. Petitioner timely gave notice of appeal and was ordered released pending appeal on February 6, 1992, under the following conditions:

> "(1) that Appellee execute an unsecured bond binding Appellee to pay the United States the sum of $200,000.00 in the event of a failure to appear as required or to surrender as directed for the service of any sentence imposed; (2) Appellee shall maintain employment or if unemployed actively seek employment; (3) maintain or commence an educational program at North Harris County College; (4) abide by the following restrictions in place of abode or travel: Southern District of Texas, and not associate with any person engaging in criminal activities or has been charged with or convicted of a felony offense or has been released on bail, probation, or parole; (5) avoid all contact with any alleged victim of the offense charged or with any potential witness who may testify concerning the offense; (6) report on a regular basis to the United States Pretrial Services agency and meet such requirements as the agency may direct; (7) refrain from the excessive use of alcohol and any other unlawful possession of a narcotic drug and other

> controlled substance unless prescribed by a licensed medical practitioner; (8) participate in drug and alcohol screening and treatment as directed by pretrial services; (9) surrender any passport or in the alternative obtain no passport; and (10) Appellee is to take no commercial flights except for business purposes which are to be cleared with pretrial services three days in advance." (1 R. 271-275).

Petitioner abided by those strict conditions of release, and on May 26, 1993, the Clerk of the United States Court of Appeals for the Fifth Circuit notified the Clerk of the District Court that a certified copy of an order by this Court denying Petitioner's application for writ of certiorari had been received, and that a mandate had been issued. A copy of that notice was sent to the Assistant United States Attorney, Duke Millard.

Normally, an order to surrender is quickly issued by the trial court and Petitioner would begin serving her sentence.

For over three years, Petitioner abided by the strict conditions of release anxiously waiting for the order to surrender. Petitioner was unable to advance in her employment because at any moment she would have to begin serving her eight-month sentence. Petitioner also did not pursue a university degree for fear that her surrender date would be forthcoming. Petitioner was also unable to have a serious romantic relationship and lived under the constant threat of her sentence.

Finally, after three years, Petitioner instigated an investigation by her Pre-Trial Services supervising officer which resulted in an order to surrender.

On August 15, 1996, Petitioner filed a pleading styled "Defendant LaTonya Moore's Motion for Credit for Time Spent Erroneously at Liberty Or, in the Alternative, Motion for Resentencing Pursuant to 28 U.S.C. § 2255." Petitioner claimed that the Government's failure to timely order her to serve her sentence, through

no fault of her own, had subjected Petitioner to the strict conditions of release for over three years, in effect amending her original sentence to include additional supervised release. Petitioner reminded the District Court that probation was an alternative under the sentencing guidelines at the time of her original sentence, and the Court resentenced Petitioner to three years' probation. The United States of America appealed the District Court's decision, and on October 6, 1997, the Panel, consisting of Circuit Judges Reavley, Barksdale and Stewart, vacated the order of the District Court.

Petitioner timely filed a Suggestion for Rehearing En Banc, and all other appellate prerequisites have been met.

ARGUMENT

A. THE DISTRICT COURT PROPERLY UTILIZED ITS JURISDICTION PURSUANT TO 28 U.S.C. § 2255 TO AMEND PETITIONER'S SENTENCE SO AS TO AVOID THE MISCARRIAGE OF JUSTICE WHICH WAS CAUSED BY THE GOVERNMENT'S FAILURE TO REQUIRE PETITIONER TO TIMELY SERVE HER SENTENCE.

The Panel correctly recognized that the District Court could modify an individual's sentence pursuant to 28 U.S.C. § 2255, but found that such remedy is only "reserved for transgressions of constitutional rights and for a narrow range of injuries that would not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice." **Appendix A**, page 4, citing *United States v. Payne*, 99 F.3d 1273, 1281 (Fifth Cir. 1996).

The Panel vacated the decision of the District Court modifying Petitioner's sentence, holding:

> "The facts in the pending case do not demonstrate conduct so 'affirmatively wrong' or 'grossly negligent' that requiring Moore to serve her original sentence

> would amount to a due process violation or a complete miscarriage of justice." **Appendix A**, page 1a.

The District Court, in its order of September 13, 1996, recognized the miscarriage of justice in the following manner:

> First, the Court notes that according to the Presentence Investigation Report issued by the Probation Department prior to Moore's sentencing, she had a total offense level of 9 and a criminal history category of I resulting in a guideline range of 4 - 10 months. Additionally, pursuant to 18 U.S.C. § 3561(b)(1), the Court could have probated Moore's sentence for a term of not less than one year but no more than 5 years. According to testimony at the hearings before this court, Moore has complied with the conditions of supervised pretrial release without incident for the last four years since her conviction.
>
> Furthermore, she has maintained both gainful employment and attended colleges in the Houston area. Based on Moore's compliance with four years of pretrial release conditions, and since the delay in serving her sentence was caused by no fault of her own, the Court finds that it is appropriate at this juncture to resentence Moore within the appropriate guideline range."

B. REQUIRING PETITIONER TO SERVE HER ORIGINAL SENTENCE, IN ADDITION TO THE THREE YEARS OF SUPERVISED RELEASED OCCASIONED BY THE GOVERNMENT'S FAILURE TO ISSUE A TIMELY NOTICE OF SURRENDER, VIOLATES PETITIONER'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AND IS CONTRARY TO THE FIFTH CIRCUIT'S PRIOR DECISIONS IN *Shields v. Beto*, 370 F.2d 1003 (5th Cir. 1967).

In *Shields, supra*, the State of Texas sentenced habeas petitioner to 40 years imprisonment in 1933; in 1934, Shields was granted a 60-day furlough. Shields went to Louisiana to serve a sentence and Texas did not place a detainer on him at the Louisiana prison. Shields was released from the Louisiana prison in 1944. In 1962, 28 years after his furlough, Shields was convicted on a new charge in Texas and ordered to serve the new sentence plus the 39 years remaining on his 1933 conviction. The Fifth Circuit, after noting "a lapse of more than 28 years" and that "Texas showed no interest in the return of the prisoner, either by agreement between the sovereigns, by detainer, or any other affirmative action taken by it following his release in Louisiana," found that requiring Shields to serve the remaining time on the 1933 conviction amounted to a denial of due process. *Shields, supra,* at 1006.

In the present case, Petitioner was required to wait anxiously for 38 months under strict conditions of release to begin serving her eight-month sentence. The resulting miscarriage of justice could not have been raised on direct appeal, and the trial court properly recognized that fact and appropriately amended Petitioner's sentence pursuant to 28 U.S.C. § 2255.

Assuming for argument for purposes only that the Clerk could consider Petitioner's time spent erroneously at liberty as her supervised release time, in order to recognize that fact the District Court would have to amend Petitioner's sentence, which the Panel opinion erroneously held the District Court did not have the authority to do.

CONCLUSION

The Fifth Circuit's panel opinion vacating the District Court's order resentencing Petitioner was improper, requiring this Court to utilize its supervisory powers to decide this important question of federal law. The petition should be granted.

Respectfully submitted,
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APPENDIX A

FILED
U.S. COURT OF APPEALS
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CHARLES R. FULBRUGE III
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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-20988

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

LATONYA MOORE,

Defendant-Appellee.

Appeal from the United States District Court for
the Southern District of Texas
(H-CR-91-89-02)

Before REAVLEY, BARKSDALE and STEWART, Circuit Judges.

REAVLEY, Circuit Judge:*

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*Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

By this appeal the United States challenges a district court order resentencing appellee Latonya Moore to a term of probation. In 1991, Moore was convicted of interfering with a flight crew in violation of 49 U.S.C. § 1472 (j).[1] She was sentenced to eight months in prison and a three-year term of supervised release. The court ordered Moore to surrender to a federal prison. On February 6, 1992, the court entered an order that granted Moore's motion to continue bail on appeal by staying the order of surrender. The order provides that the order of surrender is "stayed pending appeal." The February 6 order imposed several conditions of release, including a requirement that Moore regularly report to the United States pretrial services agency.

Moore's conviction was affirmed,[2] and by order entered on March 16, 1993, the district court granted a second motion to continue bail pending Moore's application for a writ of certiorari. On May 4, 1993, the court entered a second order of surrender, which it later vacated because the petition for writ of certiorari was still pending.

On May 24, 1993, the Supreme Court denied Moore's petition. However, due to what the district court describes as a "breakdown in the Clerk's office," a new order of surrender was not forthcoming. Moore claims that she brought this oversight to the government's attention. Moore continued to report to pretrial services as a condition of her release. Eventually the absence of a new order of surrender was discovered and the district court entered an order of surrender on August 6, 1996.

Moore then filed a motion "for credit for time spent erroneously at the liberty," or in the alternative for resentencing pursuant to 28 U.S.C. § 2255. After a hearing, the court vacated its original sentence and imposed a sentence of probation. At the hearing and in its order granting this relief, entered on September 15, 1996, the court

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1. Recodified at 49 U.S.C. § 46504.

2. *United States v. Hicks*, 980 F.2d 963 (5th Cir. 1992).

stated that the government's delay in executing the original sentence did not amount to a constitutional violation. However, the court noted that Moore "has kept out of trouble" and "has complied with the conditions of supervised pretrial release without incident for the last four years." The court was of the view that "justice has been served in this case."

The district court had not authority to modify the original sentence. Under 18 U.S.C. § 3582, the court may not modify a sentence once it has been imposed, except (1) upon motion of the Bureau of Prisons requesting a reduction in the sentence, (2) on grounds permitted by Fed. R. Crim. P. 35, and (3) on grounds that the Sentencing Commission has lowered the applicable sentencing range subsequent to the sentence.[3] Rule 35 authorizes reduction of a sentence (1) after remand for resentencing by the court of appeals, (2) for substantial assistance to the government, or (3) to correct an "arithmetical, technical, or other clear error" within seven days of the original sentence. This case falls within none of the statutory grounds for modifying a sentence.

Moore argues that she was entitled to habeas relief under 28 U.S.C. § 2255. That statute authorizes a district court to resentence a "prisoner in custody"[4] if it finds that "the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack . . . . ." We have stressed that relief under § 2255 "is reserved for trans-

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3. *United States v. Bridges*, 116 F.3d 1110, 1112 (5th Cir. 1997).

4. We assume without deciding that because Moore was under supervised release at the time she filed her motion she meets the "in custody" requirement for a petitioner seeking relief under § 2255. *See Garlotte v. Fordice*, 115 S. Ct. 1948, 1951 (1995) ("*Maleng* recognized that we had 'very liberally construed the 'in custody' requirement for purposes of federal habeas,' but stress that the Court had "never extended it to the situation where a habeas petitioner suffers no present restraint from a conviction.'") (quoting *Maleng v. Cook*, 490 U.S. 488, 492 (1989)).

gressions of constitutional rights and for a narrow range of injuries that would not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice."[5]

In our view, the government's delay in executing Moore's sentence, while regrettable, does not rise to the level of a constitutional violation or a "complete miscarriage of justice" required for § 2255 relief. In a somewhat analogous situation, the Supreme Court has held that the government can constitutionally issue a warrant for a parole violation, and wait until the parolee has served a ten-year state court sentence before executing the warrant.[6] We have similarly held that a delay of over three years in executing a warrant for revocation of probation did not violate the probationer's due process rights.[7]

The Ninth Circuit recognizes a doctrine of "credit for time at liberty," under which "a convicted person is entitled to credit against his sentence for the time he was erroneously at liberty provided there is a showing of simple or mere negligence on behalf of the government and provided the delay in execution of sentence was through no fault of his own."[8] Under this doctrine Moore might not be entitled to relief, since "[t]raditionally, the doctrine of credit for time at liberty has only been applied where a convicted person has served some part of his sentence and then been erroneously released."[9]

We did hold, in *Shields v. Beto*, [10] that executing a sentence after excessive delay can amount to a constitutional violation that en-

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5. *United states v. Payne*, 99 F.3d 1273, 1281 (5th Cir. 1996) (quoting *United States v. Vaughn*, 955 F.2d 367, 368 (5th Cir. 1992)).

6. *Moody v. Daggett*, 429 U.S. 78 (1976).

7. *United States v. Fisher*, 895 F.2d 208 (5th Cir. 1990).

8. *United States v. Martinez*, 837 F.2d 861, 865 (9th Cir. 1988).

9. *Id.*; but see *Clark v. Floyd*, 80 F.3d 371, 374 (9th Cir. 1996).

10. 370 F.2d 1003 (5th Cir. 1967).

titles the petitioner to habeas corpus relief. In that case, the State of Texas sentenced habeas petitioner Shields to 40 years imprisonment in 1933. In 1934, Shields was granted a 60-day furlough. Shields went to Louisiana to serve a sentence, and Texas did not place a detainer on him at the Louisiana prison. Shields was released from the Louisiana prison in 1944. In 1962, 28 years after his furlough, he was convicted on a new charge in Texas and ordered to serve that new sentence plus the 39 years remaining on his 1933 conviction. After noting "a lapse of more than 28 years," and that Texas had "showed no interest in the return of the prisoner, either by agreement between the sovereigns, by detainer, or any other affirmative action taken by it following his release in Louisiana," we held that requiring Shields to serve the remaining time on the 1933 conviction would amount to a denial of due process.[11]

We have since made clear, in distinguishing *Shields* time and again,[12] that our holding in that case is a narrow one based on the extreme facts presented. For example, in *Piper v. Estelle,*[13] the habeas petitioner was convicted on federal and state charges. The crimes were committed while the petitioner was on parole. Texas revoked his parole and released him to federal custody to serve his federal sentence. Texas did not file a detainer to return him to state custody until 22 months after his parole was revoked. We rejected his argument that under *Shields* Texas had waived jurisdiction over the petitioner. We interpreted *Shields* as holding that "it is not sufficient to prove official conduct that merely evidences a lack of eager pursuit or even arguable lack of interest. Rather the waiving state's action must be so affirma-

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11. *Id.* at 1006.

12. *E.G., Fabian v. Reed,* 714 F.2d 39, 41 (5th Cir. 1983); *Holtzinger v. Estelle,* 488 F.2d 517, 518 (1974); *Mills v. Beto,* 477 F.2d 124, 125 (5th Cir. 1973); *Wethers v. Henderson,* 480 F.2d 559, 560 n.1 (5th Cir. 1973); *Dorrough v. Texas,* 440 F.2d 1063, 1064 (5th Cir. 1971); *Hanks v. Wideman,* 434, F.2d 256, 257 (5th Cir. 1970); *Bilton v. Beto,* 403 F.2d 664, 665 (5th Cir. 1968).

13. 485 F.2d 245 (5th Cir. 1973).

tively wrong or its inaction so grossly negligent that it would be unequivocally inconsistent with 'fundamental principles of liberty and justice' to require a legal sentence to be served in the aftermath of such action or inaction."[14]

The facts in the pending case do not demonstrate conduct so "affirmatively wrong" or "grossly negligent" that requiring Moore to serve her original sentence would amount to a due process violation or a complete miscarriage of justice. The court issued three separate orders of surrender, and the government continued throughout the relevant period to monitor, through pretrial services, Moore's whereabouts and compliance with the terms of her release. The government did not demonstrate such an extreme lack of interest in carrying out the original sentence that we can say it waived jurisdiction over Moore.

For the foregoing reasons, the September 16, 1996 order granting the motion for resentencing and the amended judgment resentencing Moore are VACATED.

The court requests the United States Attorney to call attention of the responsible persons, in the Bureau of Prisons or other agency, to the consequences of the breakdown in the district court and the reason to expedite consideration of earliest release of Latonya Moore.

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14. *Id.* at 246.